

Decision\_\_\_\_\_

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Gildred Building Company, dba The Gildred  
Companies; Ocotillo Solar LLC,

Complainants,

vs.

Case 16-10-021

Southern California Edison Company (U338E),

Defendant.

(See Attachment A for Appearances.)

**DECISION DISMISSING COMPLAINT**

**Summary**

The complaint is dismissed based on the failure to state a claim upon which relief can be granted. The proceeding is closed.

**1. Facts**

The material facts of this case are not in dispute.<sup>1</sup> The complainants are Gildred Building Company, dba The Gildred Companies (Gildred) and Ocotillo

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<sup>1</sup> Joint Statement of Stipulated Facts, July 26, 2017.

Solar LLC (Ocotillo Solar).<sup>2</sup> The defendant is Southern California Edison Company (SCE).<sup>3</sup> The complaint was filed on October 21, 2016.<sup>4</sup> The subject of the complaint is SCE's conduct related to Gildred's participation in SCE's 2014 Renewable Portfolio Standard (RPS) Solicitation.<sup>5</sup> The Commission established the terms and conditions of the 2014 RPS Solicitation in Decision (D.) 14-11-042.<sup>6</sup> D.14-11-042 also conditionally adopted the Procurement Protocol for the 2014 RPS Solicitation.<sup>7</sup> The Procurement Protocol included the following: a time frame for the SCE RPS Solicitation; the specific energy products SCE would solicit; certain requirements for proposals (also referred to as bids); and the methods that SCE could use to evaluate the merits of the bids.<sup>8</sup> The Procurement Protocol is attached to the complaint at Exhibit A and also attached to the joint statement of stipulated facts, filed July 26, 2017,<sup>9</sup> at Joint Exhibit A.<sup>10</sup>

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<sup>2</sup> Amended Complaint, Paragraph 1 at 1-2, "The Gildred Companies is a fictitious name used for several entities including Gildred Building Company, Gildred Solar LLC and Ocotillo Solar LLC. Gildred Building Company is the 100% owner of Gildred Solar LLC, which in turn is the 100% owner of Ocotillo Solar LLC."

<sup>3</sup> Amended Complaint, Paragraph 1 at 2.

<sup>4</sup> While the complainants originally filed their complaint on October 21, 2016, a significant amount of information in their complaint was filed under seal. At the prehearing conference held on February 9, 2017, the parties agreed to re-file the documents previously filed, but with less information redacted. The re-filed documents are dated February 14, 2017. The re-filed documents are substantively identical to the previously filed documents.

<sup>5</sup> Amended Complaint, Paragraph 1 at 2.

<sup>6</sup> Amended Complaint, Paragraph 6 at 4.

<sup>7</sup> SCE's Final 2014 RPS Procurement included a revised Procurement Protocol and was filed December 8, 2014 and was accepted by Energy Division.

<sup>8</sup> Amended Complaint, Paragraph 7 at 4.

<sup>9</sup> In response to the June 19, 2017 e-mail ruling of the Administrative Law Judge, complainants together with the defendant filed a joint statement of stipulated fact on July 26, 2017. The joint

*Footnote continued on next page*

Prior to participating in the 2014 RPS Solicitation, Gildred signed a *Seller's Acknowledgments Letter* whereby it agreed to be bound to all terms and conditions of SCE's Procurement Protocol.<sup>11</sup> A signed copy of the *Seller's Acknowledgments Letter* is attached to the joint statement of stipulated facts, filed July 26, 2017, as Joint Exhibit D.

On January 30, 2015, Gildred submitted a bid into SCE's 2014 RPS Solicitation.<sup>12</sup> Gildred's bid was for a project known as the Ocotillo Wells Project, a 20-year contract for a 50 MW photovoltaic project located in Ocotillo Wells in San Diego County, California (Ocotillo Wells Project).<sup>13</sup> SCE entered into negotiations with Gildred for a contract (also referred to as a "power purchase agreement" or PPA).<sup>14</sup>

Under the Commission-approved Procurement Protocol for the 2014 RPS Solicitation, SCE is not obligated to award any contracts out of the solicitation and, at its sole discretion, can choose to not enter into any final agreements.<sup>15</sup> Moreover, the Procurement Protocol specifically provides that SCE will not be deemed to have accepted any proposal, and will not be bound by any term

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statement of stipulated facts included Joint Exhibits A-D, which the parties stipulate to the existence and entry into evidence. These exhibits are entered into evidence.

<sup>10</sup> Amended Complaint at Exhibit A; Joint Statement of Stipulated Facts, July 26, 2017 at Joint Exhibit A.

<sup>11</sup> A copy of the Seller's Acknowledgments Letter, signed by Gildred, is attached to SCE's Motion to Dismiss and attached to the Joint Statement of Stipulated Facts, July 26, 2017, Joint Exhibit D.

<sup>12</sup> Amended Complaint, Paragraph 8 at 4.

<sup>13</sup> Amended Complaint, Paragraph 8 at 4.

<sup>14</sup> Amended Complaint, Paragraph 12 at 6.

<sup>15</sup> Amended Complaint, Exhibit A, Procurement Protocol at Section 4.01; Joint Statement of Stipulated Facts, July 26, 2017 at Joint Exhibit A.

thereof, unless and until authorized representatives of SCE and Seller execute a final agreement.<sup>16</sup>

## **2. Standard of Review**

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and on matters of law.<sup>17</sup> As we recently stated,

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law.<sup>18</sup>

The Commission does not accept as true the ultimate facts, or conclusions, that the complainant alleges, for instance, that the utility has violated tariffs or rules.<sup>19</sup> “After accepting the facts as stated, the Commission examines them in the light of applicable law and policy.”<sup>20</sup> In applying this standard of review, the Commission is “guided by the standards set forth in Pub. Util. Code § 1702, which provides that the complainant must allege that a regulated utility has engaged in an act or failed to perform an act in violation of any law or commission order or rule.”<sup>21</sup>

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<sup>16</sup> Amended Complaint, Exhibit A, Procurement Protocol at Section 9.01; Joint Statement of Stipulated Facts, July 26, 2017 at Joint Exhibit A.

<sup>17</sup> D.14-03-032 at 4.

<sup>18</sup> D.17-08-016 at 4.

<sup>19</sup> D.12-03-037 at 7, citing to D.99-11-023.

<sup>20</sup> D.12-03-037 at 7, citing to D.99-11-023.

<sup>21</sup> D.12-07-005 at 7.

**3. The Complaint Fails to Allege any Violation of Law or Commission Order or Rule.**

**3.1. Complainants fail to allege facts to establish that SCE engaged in bad faith repudiation of a final PPA**

Complainants alleged in the first cause of action that SCE acted in bad faith by repudiating a final binding contract. We find that the allegations set forth in the complaint fail to establish that a final binding agreement existed. Therefore, SCE's alleged actions, even if true, do not give rise to a cause of action because there was no final binding agreement.

Signature by both parties is required before the formation of a binding PPA pursuant to the 2014 RPS Solicitation's Procurement Protocol adopted by the Commission in D.14-11-042. Under the Procurement Protocol, SCE is deemed to have accepted a proposal, and is bound by any term thereof, when an authorized representative of SCE and seller execute a final contract. The Procurement Protocol provides that "SCE will not be deemed to have accepted any Proposal, and will not be bound by any term thereof, unless and until authorized representatives of SCE and Seller execute a Final Agreement..."<sup>22</sup> Gildred signed the final version of the contract on or about March 1, 2016.<sup>23</sup> The complainants do not allege that SCE signed the final version of the contract and, moreover, the complaint includes, as Exhibit B to the complaint, the final version

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<sup>22</sup> Amended Complaint, Exhibit A, Procurement Protocol, Section 9.01; Joint Statement of Stipulated Facts, July 26, 2017 at Joint Exhibit A.

<sup>23</sup> Amended Complaint, Paragraph 21 at 9.

of the contract unsigned by SCE and signed by Gildred.<sup>24</sup> Because the final version of the contract was never signed by SCE, a binding contract between SCE and the complainants never existed under the Procurement Protocol, adopted by D.14-11-042. As a result, accepting Gildred's factual allegations, SCE could not have acted in bad faith in repudiating a contract, because no contract was formed.

The complainants also allege that a binding contract was formed based on statements or action by SCE employees. Even if true, those alleged statements and actions, under the terms of the Commission-approved Procurement Protocol, do not mean a contract was formed, since formation requires SCE's signature. These alleged statements or actions have no bearing on the formation of a contract under the 2014 RPS Procurement Protocol.

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<sup>24</sup> Amended Complaint at Exhibit B at 82. The Commission hereby unseals the signature page of Exhibit B, which contains no confidential information. Joint Exhibit B to the Joint Statement of Stipulated Facts also includes the contract with the signature page (unsigned by SCE).

**3.2. Complainants fail to allege facts to establish that SCE acted in bad faith in its dealings with Gildred in connection with the 2014 RPS Solicitation**

Within the context of the 2014 RPS Solicitation, complainants allege in the second cause of action that SCE acted in bad faith in its dealings with Gildred by conducting negotiations in an untimely manner. Complainants' allegations rely on Section 8.02 of the Procurement Protocol, which provides, "It is expected that the Parties will act in good faith in their dealings with each other with respect to this RPS Solicitation."<sup>25</sup>

Complainants allege that "SCE intentionally delayed entering into a PPA [contract] for the Ocotillo Wells Project in connection with the 2014 RPS solicitation. SCE's conspicuous foot-dragging in the negotiations and dealings with Gildred from September 2015 through May 2016, ...compel the conclusion that SCE did not act in good faith toward Gildred in connection with the 2014 RPS solicitation."<sup>26</sup>

Even if true, these allegations do not allow complainants to prevail since complainants' own allegations show that SCE did not act outside of any time constraints for contract negotiations. Thus, complainants fail to state a cause of action.

**3.3. Complainants fail to allege facts to establish that SCE's rejection of Gildred's contract if based on a comparison to bids received in 2015 RPS Solicitation violated the 2014 RPS Procurement Protocol**

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<sup>25</sup> Amended Complaint, Paragraph 29.

<sup>26</sup> Amended Complaint, Paragraph 30.

Within the context of the 2014 RPS Solicitation, complainants allege in the third cause of action that SCE acted unlawfully by relying on information from the 2015 RPS Solicitation when rejecting Gildred's contract. Complainants' allegations rely on Section 4.01 of the Procurement Protocol which states that "SCE evaluates and ranks Proposals [bids] based on least-cost best-fit (LCBF) principles that comply with criteria set forth by the CPUC [Commission] in D.03-06-071 and D.04-07-029 ("LCBF Decisions") and D.14-11-042."<sup>27</sup>

Complainants allege that SCE's "... attempt to reject the PPA [contract] entered into with Ocotillo Solar based upon a comparison to the new pricing of the proposals [bids] received in the 2015 RPS solicitation, compel the conclusion that SCE did not act in good faith toward Gildred in connection with the 2014 RPS solicitation."<sup>28</sup>

Even accepting these allegations as true, the allegations fail to establish a violation of the Procurement Protocol. First, Section 4.01 of the Procurement Protocol adopted by the Commission in D.14-11-042 and relied upon by Gildred to establish a violation of the Procurement Protocol describes the process and the types of information that SCE should use when evaluating bids, not contracts. A different process is set forth in the Procurement Protocol for SCE to use when evaluating whether to enter into a contract.

That process is also set forth, at least in part, in Section 4.01 and provides that SCE is not obligated to award any contract out of the solicitation. Under the

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<sup>27</sup> Amended Complaint, Paragraph 33 at 12; Amended Complaint Exhibit A, Procurement Protocol, Section 4.01; Joint Statement of Stipulated Facts July 26, 2017 at Joint Exhibit A.

<sup>28</sup> Amended Complaint, Paragraphs 33 and 34 at 12.



Procurement Protocol, at SCE's sole discretion, SCE can choose to not enter into any final contracts.<sup>29</sup>

Section 4.01 of the Procurement Protocol provides, "SCE, in its sole discretion, reserves the right to enter into Final Agreements with as many Sellers as SCE chooses, including the right to not enter into any Final Agreements at all."<sup>30</sup>

Section 4.01 directs SCE to consider only certain information to identify the bids, but if that bid moves forward into the contract negotiation phase of the 2014 RPS Solicitation, SCE is solely authorized to decide whether to enter into a binding contract under the Procurement Protocol. SCE controls the type of information relied upon to decide whether to execute a final contract.

Therefore, even if complainants' allegation is true that SCE relied on information from the 2015 RPS Solicitation to determine whether or not to execute a contract with Gildred, this allegation fails to establish a violation of the Procurement Protocol because SCE, in its sole discretion, is authorized to decide whether to enter into a contract under Section 4.01 of the Procurement Protocol and is not limited as to the information relied upon.

**3.4. Complainants fail to allege facts to establish that SCE failed to comply with the 2014 RPS Procurement Protocol and thereby violated D.14-11-042**

Complainants' fourth cause of action alleges that SCE failed to comply

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<sup>29</sup> Amended Complaint at Exhibit A, Procurement Protocol, Section 4.01; Joint Statement of Stipulated Facts July 26, 2017 at Joint Exhibit A.

<sup>30</sup> Amended Complaint at Exhibit A, Procurement Protocol, Section 4.01; Joint Statement of Stipulated Facts July 26, 2017 at Joint Exhibit A.

with the 2014 RPS Procurement Protocol and thereby violated D.14-11-042. Complainants do not allege any additional facts in the fourth cause of action. Complainants state that, to the extent SCE violated the Procurement Protocol, SCE also violated D.14-11-042 because that decision adopted the Procurement Protocol. Any alleged violations of D.14-11-042 are addressed above regarding the dismissal of complainants' first, second, and third cause of action. No additional or new facts are alleged in the fourth cause of action.

#### **4. Appeal of Presiding Officer's Decision**

On September 29, 2017, pursuant to § 1701.2(d) and Rule 14.4(a) of the Commission's Rules of Practice and Procedure, the complainants timely appealed the August 30, 2017 Presiding Officer's Decision dismissing the complaint. The defendant timely responded to the appeal on October 16, 2017. The arguments set forth in the appeal are without merit and largely repeat the complainants' prior arguments. The Commission has reviewed the appeal and the response. The flaws in the four major arguments presented on appeal are addressed below.

1. Regarding the Second Cause of Action, the complainants argue in their appeal that the Presiding Officer's Decision errs by applying the incorrect standard of review. The error, according to the complainants, is that the Presiding Officer's Decision fails to accept as true the fact that SCE intentionally delayed negotiations in bad faith. The complainants' argument is without merit; we accepted as true the well-pleaded facts in the complaint and, on that basis, found that even if true, such facts do not entitle the complainants to the relief requested, i.e., a Commission order directing SCE to enter into a 20-year contract with complainants.
2. Regarding the Second Cause of Action, the complainants argue in their appeal that the Presiding Officer's Decision errs by finding that, even if it is true that SCE intentionally delayed negotiations, there is no basis on which to grant relief because, based on the

- allegations in the complaint, SCE did not contravene any applicable time constraints for contract negotiation. No Procurement Protocol timeline for negotiating was cited. Complainants' argument is without merit. We do not decide whether allegations other than untimeliness could establish bad faith under the Procurement Protocol, as complainants' allegations are based on untimeliness.
3. Regarding the First Cause of Action, the complainants argue in their appeal that the Presiding Officer's Decision errs by interpreting the Procurement Protocol as requiring signatures by both parties before a binding contract is formed. The complainants argue that SCE's employees could have demonstrated the intent to sign, thereby forming a binding contract, in the absence of an actual signature, despite the plain language to the contrary in the Commission-approved Procurement Protocol. The complainants made the same argument in their opposition to the motion to dismiss filed in this proceeding. The complainants' argument has no merit. The rules for forming a binding contract within the 2014 Solicitation are set forth in the Procurement Protocol, and the Procurement Protocol requires SCE's signature. Thus, even if complainants' allegations are true, as we assume here, there is no legal basis to grant relief as no binding contract ever existed.
  4. Regarding the Third Cause of Action, the complainants argue in their appeal that the Presiding Officer's Decision errs in finding that the Procurement Protocol permits SCE to compare the complainants' bid (mischaracterized by complainants as a PPA/binding contract) to other bids in a subsequent solicitation. The complainants' argument has no merit. No restrictions apply to comparing bids in different solicitations. Thus, even if true, the complainants fail to establish a legal case for relief.

## **5. Categorization and Need for Hearing**

The categorization of this proceeding is adjudicatory. The Commission preliminarily determined that this proceeding would require evidentiary hearings. But because this proceeding is resolved on the basis of the motion to dismiss, no evidentiary hearings are necessary, and none were held. The

preliminary determination that hearings are necessary is changed to “No hearings are necessary.”

## **6. Assignment of Proceeding**

Liane M. Randolph is assigned Commissioner and Regina M. DeAngelis is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. The complainants do not allege that SCE signed the final version of the contract and, moreover, the complaint includes, as Exhibit B to the complaint, the final version of the contract unsigned by SCE and signed by Gildred.

2. The alleged statements or actions by SCE employees set forth in the complaint, even if true, have no bearing on the formation of a contract under the 2014 RPS Procurement Protocol.

3. Negotiations and dealings between Gildred and SCE took place from September 2015 through May 2016.

4. Complainants do not allege that SCE acted outside of the Commission-approved timeline for negotiating contracts under the Procurement Protocol.

5. Even if true, complainants’ allegation that SCE relied on information from the 2015 RPS Solicitation to determine whether to execute a contract with Gildred, fail to establish a violation of the Procurement Protocol because SCE, in its sole discretion, is authorized to decide whether to enter into a contract under Section 4.01 of the Procurement Protocol and is not limited as to the information relied upon.

### **Conclusions of Law**

1. Even taken as true, the facts alleged in the complaint do not establish a legal basis for the requested relief.

2. The determination in the scoping memo that hearings are necessary should be changed because, even if true, the complaint fails to allege facts on which requested relief can be granted.

3. The complaint fails to allege any violation of law or Commission Order or Rule.

4. Under the Procurement Protocol adopted by the Commission in D.14-11-042, SCE is not obligated to award any PPAs out of the solicitation and, at SCE's sole discretion, SCE can choose to not enter into any final contracts.

5. The allegations set forth in the complaint, even if true, fail to establish that a final binding agreement existed. If no agreement existed, as a matter of law and taking as true complainants' allegations, SCE could not have repudiated such agreement.

6. Complainants do not allege that SCE acted outside of any timeline established for negotiating under the Procurement Protocol and, as a result, no cause of action for bad faith based on intentional delay in negotiations is established.

7. Even if SCE relied on information from the 2015 RPS Solicitation, there is no basis to grant requested relief.

8. With one exception, the July 26, 2017 motion to file under seal the confidential version of the joint statement of stipulated facts is granted. Joint Exhibits A, B, C, and D are entered into evidence. The exception is the amended complaint at Exhibit B at 82. This page is unsealed as it includes no confidential information. This is the signature page of Exhibit B. This signature page is also found at Joint Exhibit B to the Joint Statement of Stipulated Facts also includes the contract with the signature page (unsigned by SCE).

**O R D E R**

**IT IS ORDERED** that:

1. Case 16-10-021 is dismissed for failure to state a claim upon which relief can be granted.
2. The preliminary determination in the scoping memo of "hearings needed" is changed to "hearing not needed."
3. Case 16-10-021 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

# ATTACHMENT A

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(End of Attachment A)